



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: JBS Missouri, Inc.
File: B-230838
Date: April 8, 1988

DIGEST

Department of Defense (DOD) set-aside program for small disadvantaged businesses which does not contain an exclusion for procurements which have been previously set aside for small businesses is a legally permissible implementation of section 1207 of the DOD Authorization Act, which specifically allows the use of less than full and open competitive procedures to meet that goal.

DECISION

JBS Missouri, Inc. protests request for proposals (RFP) No. N00140-87-R-4179, issued by the Navy for mess attendant services. The protester argues that the solicitation, which was set aside totally for small disadvantaged businesses, should be amended to allow competition by small businesses that have previously performed successfully under small business set-aside contracts for these same requirements. We dismiss the protest.

The solicitation was issued in August 1987 as a total set-aside for small disadvantaged businesses (SDBs) pursuant to the Department of Defense Federal Acquisition Regulation Supplement (DFARS) §§ 219.501-70 and 219.502-72, 52 Fed. Reg. 16,263, 16,266 (1987). This special category of set-aside was authorized by section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816 (1986), which establishes a Department of Defense (DOD) goal of awards to SDBs of 5 percent of the dollar value of total contracts to be awarded for fiscal years 1987, 1988 and 1989. Section 1207(e) permits the use of less than full and open competitive procedures to accomplish the goal, provided that contract prices do not exceed fair market value by more than 10 percent.

On May 4, 1987, to implement this statutory mandate, DOD published the first of two interim rules, each of which established the procedures for conducting SDB procurements.


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The first interim rule was made effective for all DOD solicitations issued on or after June 1, 1987. 52 Fed. Reg. 16,263. On February 19, 1988, after reviewing public comments, DOD published a second interim rule. 53 Fed. Reg. 5,114 (1988). This rule, effective March 21, 1988, superseded the first interim rule.

In order to totally restrict its solicitation to SDBs, the Navy's contracting officer, under the first interim rule, would only have to determine that competition could be expected to result between two or more SDB concerns and that a reasonable expectation existed that the award price would not exceed the fair market price by more than 10 percent. Under the second interim rule, a total set-aside for SDBs would be prohibited if the solicited service had been previously acquired successfully on the basis of a small business set-aside under Federal Acquisition Regulation (FAR) § 19.501(g). 53 Fed. Reg. 5,123.

The protest by JBS is based upon the second interim rule. However, the second interim rule only applies to solicitations issued on or after March 21, 1988. Techplan Corp., et al., B-228396.3, Mar. 28, 1988, 88-1 CPD ¶ _____. Since the solicitation was issued in August 1987, the first interim rule, which we found in Techplan to be a legally permissible implementation of section 1207, controls. The set-aside for SDBs was therefore proper.

The protest is dismissed.


Ronald Berger
Deputy Associate
General Counsel